Docket No. 2000-9 CARP DTRA1&2
11/4/02
CBI
•Opposition to motion of Librarian to dismiss petition of review as out of time and for lack of standing
•Reply Opposition
•Opposition to Motion of Librarian for issuance of show cause order
•Correct petition for review

Docket No. 2000-9 CARP DTRA1&2
11/6/02
Librarian
•Motion to dismiss IBS/Harvard's petition for review for lacl of standing

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLLEGIATE BROADCASTERS, INC., Petitioner,	)	Case No. 02-1322
v.	)	
LIBRARIAN OF CONGRESS, Respondent.	)	

COLLEGIATE BROADCASTERS' OPPOSITION TO MOTION OF THE LIBRARIAN OF CONGRESS TO DISMISS THE PETITION OF REVIEW AS OUT OF TIME AND FOR LACK OF STANDING;
AND
REPLY TO OPPOSITION;
AND
OPPOSITION TO MOTION OF THE LIBRARIAN OF CONGRESS FOR THE ISSUANCE OF A SHOW CAUSE ORDER.

I. INTRODUCTION

It was never the intent of Collegiate Broadcasters, Inc. ("CBI"), in its filings of October 18 and 21st, 2002, to seek direct review of the Librarian's Final Rule setting rates. Multiple appeals were timely filed by other aggrieved parties pointing out the many errors that led to the arbitrary royalty rates in the Final Rule. CBI instead chose that its counsel, Center for Internet & Society, cooperate with petitioners in the ioMedia Group and their counsel of record and provide assistance on that appeal (Docket No. 02-1244), including preparing Live365's motions for stay (which seek relief for all

webcasters). CBI also plans to seek to participate as amicus curiae in the Consolidated Appeals to present CBI members' specific concerns with respect to the Final Rule. CBI filed a Statement in Support of Motion of Live365 and Separate Motion for Stay ("Motion below") in the Copyright Office on October 11, 2002 to raise legal and factual arguments for a stay additional to those raised by Live365 and specific to college broadcasters. Late in the afternoon of Friday, October 18, 2001, with payments being due in less than 48 hours, the Librarian denied both motions for stay. CBI filed its Emergency Motion for Stay in this Court by facsimile some four hours later. CBI's intent was to seek emergency review of the Librarian's October 18th Order denying the motion for stay pending decision on others' appeals already pending in this Court, not to file a separate appeal of the June 20 Order. CBI concedes that the pleadings, hurriedly drafted, could be construed to seek direct review of the Final Rule, although that was not their intent, and therefore submits a Corrected Petition for Review. At any rate, the Memorandum CBI served the next business day should have cleared up any ambiguity. The Memorandum makes clear that by "pending appeal" CBI means the appeals of other entities:

> Two, appellants Live365, IoMedia and others are likely to succeed in their appeal filed with the D.C. Circuit, which will effect the college broadcasters' obligation to pay. As Live 365 argues in its brief, the rates set in the Final Order eliminate a new, but powerful, engine of free expression for all but the wealthiest, thereby burdening the First Amendment's right of free speech. Additionally, the rates are arbitrary and capricious in light of the record, clearly frustrate the Congressional intent in establishing a compulsory license for sound recording performance royalties.

Memorandum at 2.

The Petition for Review of the October 18 Order is timely and CBI has standing, as discussed below. The Motion To Dismiss should be denied or, in the alternative, granted with leave to file the Corrected Petition for Review. The Motion for Issuance of A Show Cause Order should be denied.

II. THE MOTION TO DISMISS SHOULD BE DENIED CBI HAS STANDING TO APPEAL THE LIBRARIAN'S OCTOBER 18 DENIAL OF ITS MOTION FOR STAY AND ITS APPEAL WAS TIMELY

The Librarian concedes that standing under 17 USC 802(g) is an issue of first impression in this Court. Motion to Dismiss at 9. The issue of whether webcasters who did not participate in the CARP have standing to challenge the Librarian's rulings in the proceeding has already been raised and fully briefed in two motions pending before this Court in the Intercollegiate Broadcasting System ("IBS") appeal (Docket No. 02-1220) and in the ioMedia Group appeal. CBI also argued the issue of standing under section 802(g) in its Motion Below (at 4-9), which was provided to this Court as Exhibit 1 to the Declaration of Jennifer S. Granick and incorporates those arguments here by reference.

In *In re GTE Service Corp.*, the Court found that the movant's application for stay was premised on the Court's authority to stay agency orders under the Administrative Procedure Act. The Copyright Office is not an agency subject to the APA, nor is the Librarian of Congress. Instead, this Court has jurisdiction over CBI's Emergency Motion by virtue of 17 U.S.C. § 802(g). Additionally, in *GTE*, the Application for Stay was denied because the Movant did not file with it a petition for review.[1] Here, court staff

[1]. From notes 2 and 4 of the *GTE* opinion, it appears that GTE filed a petition for review and new application for stay the same day as the Court denied GTE's first application, presumably after, and in response to, that denial. The opinion followed.

alerted counsel for CBI of the need to file a petition for review with the Emergency Motion by facsimile, immediately, and a petition was hurriedly drafted, signed by CBI's Will Robedee, and faxed directly to the Court within the hour so that the Emergency Motion could be considered. In *GTE*, there is no mention of GTE moving for a stay in the FCC before seeking a stay in the D.C. Circuit, so the Court could only construe its pleading as an application for stay under the APA. Here, as discussed above, CBI's Memorandum in Support of Its Motion for Stay, lodged Tuesday, October 22, 2002, makes it clear in the first paragraph that CBI is seeking as stay pending the Court's decision in the consolidated appeals of other entities. *"CBI has not filed an appeal of its own* but has been cooperating with appellants ioMedia Partners et al." (emphasis added).

The issue here is whether CBI had standing, without filing a petition of review of the Librarian's July 8, Final Rule, to move for a stay in the Copyright Office and to seek seek review in this Court under 17 U.S.C. § 802(g) of the Librarian's October 18 2002 denial of its Motion for Stay and to seek a Stay in this Court pending the decision of consolidated appeals by other entities. In *Capital Cities Media v. Toole*, 463 U.S. 1303, 1304 (1983), Circuit Justice Brennan granted a stay of a gag order in a criminal case, pursuant to an application by a media company that was not a party in the underlying action, finding that the "irreparable injury to First Amendment interests," rather than to the moving party or Pennsylvania or the criminal defendant, warranted granting a stay when there was "a significant possibility" that the Supreme Court would grant review and reverse. This case similarly involves irreparable injury to First Amendment interests.

CBI submits that the language of section 802(g) is broad enough to give this Court jurisdiction over not only an appeal (such as ioMedia Group's) from the

Librarian's Final Rule pursuant to section 802(f) but also over an appeal from the Librarian's denial of a motion to stay the obligation to pay royalties under the Final Rule. Although CBI was unable to participate in the CARP rate-setting proceeding because the arbitrators' fees were far greater than CBI's resources, it is undisputed that CBI brought a Motion For Stay in Copyright Office Docket No. 2000-9, CARP DTRA 1&2. The October 18th denial of that Motion was plainly a "decision of the Librarian of Congress under subsection (f) with respect to a determination of an arbitration panel." 17 USC § 802(g). CBI's members are "aggrieved part[ies] who would be bound by the determination." *Id.* Accordingly, CBI has standing to appeal the denial of its Motion for Stay by the Librarian of Congress. CBI's Emergency Motion was timely filed barely four hours after the Librarian issued his decision, and its Petition for Review was timely filed, by facsimile, with the Court's permission, the next business day, October 21, 2002. The Librarian's continuing efforts to preclude review of his Orders by this Court, by insisting that every aggrieved party bound by the determination that could not afford the extraordinary cost of participating in the CARP lacks standing, should not be rewarded. The Court should deny the Motion to Dismiss and consider the Merits of CBI's Emergency Motion.

III. REPLY TO OPPOSITION

The Librarian's Opposition to the Emergency Motion incorporates by reference the October 18, 2002 Order denying the Motion below. First, the Librarian erroneously concludes that the First Amendment argument cannot be raised on appeal. But the First Amendment issue only arose and ripened after the CARP, when exorbitant, confiscatory royalty rates were set. Moreover, "if an otherwise acceptable construction of a statute

would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible [the agency is] "obligated to construe the statute to avoid such problems. Courts have recognized, however, that "when agencies adopt a constitutionally troubling interpretation, however, we can be confident that they not only lacked the expertise to evaluate the constitutional problems, but probably didn't consider them at all." *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997). Obviously that was the case when the Librarian evaluated the CARP report and issued his Final Rule. That failure resulted in an unconstitutional decision and an unconstitutional failure to grant the Motions for Stay.

The Librarian recognized that webcasters' right to communicate their views on music is protected by the First Amendment. Order at 4. Thus, college broadcasters have at least a First Amendment *interest* in transmitting records. Admittedly, that interest is generally superseded by copyright if the record is another's copyrighted work. But where the webcaster has a copyright license, he is not an infringer but a speaker with the same First Amendment rights as the copyright owner. Live365 has complied with the terms of the license and, indeed, having paid the annual minimum, has an undisputed right to webcast copyrighted works going forward. This dispute is solely about the royalty rate. As shown in the Emergency Motion and above, Congress intended that the CARP set rates that even small webcasters could pay, to nurture the webcasting industry while providing a royalty stream. By instead setting rates at an exorbitant rate that many webcasters and especially educational and hobbyist webcasters cannot afford, the Librarian effectively nullified webcasters' First Amendment right to express their views

on music by exercising the license Congress gave them. By burdening speakers, the Librarian also trampled the public's First Amendment right to receive information.

The Librarian's reliance on this Court's decision in *United Video Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir.1989) is misplaced. The cable companies in *United Video* were held not to be entitled to compulsory copyright licenses because the copyright act only conferred compulsory licenses subject to the FCC's regulations. Congress chose to withhold a compulsory license from transmissions prohibited by the FCC. *Id.* at 1190. The compulsory license at issue here is different. Here, Congress did not give any agency permission to withhold the license for specific transmissions. The FCC does not determine, case by case, which webcasters will be permitted to transmit particular works, for the purpose of protecting the value of the licensor's copyrights. Nor does the Copyright office. The license is available to all webcasters.

The Librarian continues to set up straw men by asserting that the observation that exhorbitant, punitive fees have the effect of silencing lesser-known, local, ethnic and specialty genres of music, amounts to an argument that "webcasters have a First Amendment right to be free of any requirement to pay copyright fees." Opp. at 7. It does not. It is undisputed that college broadcasters pay royalties to ASCAP, SESAC and BMI for use of their musical works. CBI simply argues that arbitrary and absurdly high royalty rates burden First Amendment interests more than was necessary to achieve the interest of fairly compensating artists.

The Librarian next argues that it was not arbitrary to rely entirely on a single contrived agreement between Yahoo and RIAA as evidence of "market" rates while ignoring a real agreement between willing buyers and sellers, National Public Radio and

RIAA, concerning the rates. Order at 4-5. The reason the CARP ignored the NPR agreement after noting its existence, the Librarian explains, is that neither party offered it into evidence "nor did the arbitrators request that the agreement be submitted for its consideration." Order at 4. This position misses the point. The CARP bemoaned the lack of competent evidence and the fact that there were few agreements between buyers and sellers on which to base a rate determination. In these circumstances, allowing RIAA to hide the best evidence of the true market value for the licensed works, arrived at by a willing buyer and seller, and then instead basing the royalty rates solely on the tailor-made Yahoo agreement by default was arbitrary and a dereliction of duty. The law requires that the Librarian adopt rates that "most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." 17 U.S.C. § 114(f)(2)(B). He did not do so. Failure to consider this argument in the Motion for Stay was arbitrary and contrary to law. This Court should grant a stay so that CBI members need not pay until the Consolidated Appeals have been decided.

The Librarian's only defense of the Order's rejection of the musical works benchmark (royalty rates paid by terrestrial broadcasters to ASCAP, SESAC and BMI for transmission of recordings over the air) is that the Final Rule contained a "detailed discussion" and therefore, apparently, cannot be found arbitrary on appeal. CBI stands on the arguments made below. CBI additionally notes that between the issuance of the CARP's report and the Librarian's Final Rule, twenty Members of Congress wrote to the Librarian and advised him that they were "concerned that the CARP recommended rates for sound recording copyright owners are, however, high in comparison to historical royalty rates, such as rates paid by terrestrial broadcast radio to songwriters and music

publishers." *See* www.house.gov/boucher.docs/carp_letter.pdf. CBI is hardly the only entity that believes it was arbitrary for the Librarian to ignore the musical works benchmark. The Librarian's refusal to consider that the Court of Appeals might reach a different conclusion in the Consolidated Appeals was also arbitrary. A stay is warranted.

The Librarian arbitrarily expressly refused to consider some points in CBI's declarations below on grounds that they were "new evidence" that could not be considered on appeal. Order at 6. But these points go equally to whether granting a stay is in the interests of justice. Indeed, the Librarian gave short shrift to all of CBI's evidence on the issue of irreparable harm. He dismissed Will Robedee's and Joel Willer's lengthy and thorough explanations of why the rates threaten their college stations' ability to webcast as "speculative." Where CBI points to approximately 70 stations that have already been silenced as a result of the Librarian's rates, personally confirmed by Robedee, however, the Librarian says at most this shows the stations "chose" to stop webcasting "perhaps because they do not wish to pay the royalties." This is plainly a result-oriented dismissal of strong, competent evidence of irreparable harm. Based on his refusal to admit that even one radio or web-only station has stopped webcasting as a result of the rates in the Final Rule, the Librarian also rejected as evidence of irreparable harm the sworn declarations of recording artists Janis Ian and Emilie Autumn, and wireless content provider XSVoice's Tim Coble, which painstakingly explain and show that the arbitrary extinction of Internet radio station directly harms their enterprises. If this Court, however, accepts the overwhelming evidence that the entire webcasting community is threatened by the rates in the Final Rule, it can also appreciate that the demise of webcasting means that musicians will lose

exposure and all kinds of industries that benefit from the existence of web-based content will be harmed. The Librarian's giving this evidence little weight was arbitrary and an unconscionable abuse of discretion. The Court should grant the Emergency Motion for Stay.

IV. OPPOSITION TO MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY SANCTIONS SHOULD NOT BE IMPOSED FOR FILING A FRIVOLOUS APPEAL

As explained above, CBI's petition for review was never intended to seek review of the Librarian's Final Rule published July 8, 2000 in the Federal Register. CBI agrees that such a petition would be untimely. CBI's proposed Corrected Petition for Review should be sufficient to dispose of this straw man. The Librarian's suggestion that CBI and its counsel be sanctioned simply illustrates his desperation to avoid review of his arbitrary ruling, which is contrary to Congress's intent and impermissibly violates First Amendment rights by setting webcasting royalty rates at many times their market value, based on a single conspiratorial agreement between RIAA and Yahoo. The Motion for Issuance of a Show Cause Order should be denied.

Dated: November 4, 2002

Respectfully submitted,

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PROOF OF SERVICE

I, Joanne Newman do hereby certify and declare as follows:

I am over the age of 18 years, and not a party to the instant proceedings. I am employed in the county of Santa Clara, California. My business address is: 559 Nathan Abbott Way, Stanford, California.

On November 4, 2002 I caused to be served the following documents:

Collegiate Broadcasters' Opposition To Motion Of The Librarian Of Congress To Dismiss The Petition of Review As Out of Time and For Lack of Standing; and Reply to Opposition; and Opposition To Motion of The Librarian of Congress For The Issuance of a Show Cause Order

via U.S. Mail by placing one true copy of the above document in a properly addressed and sealed envelope with postage fully pre-paid for First-Class delivery, and deposited in a station mailbox routinely maintained by the U.S. Postal Service. Service is made on the following interested parties:

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I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 4th day of November 2002 at Stanford, California.

_____

Joanne Newman